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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1932

No. 736

IVAN E. OAKES, as Receiver,

PETITIONER,

vs.

BEN LAKE, as Sheriff of Owyhee County, Idaho,

RESPONDENT.

ON WRIT OF CERIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF RESPONDENT

The case is in this court on certiorari from the Circuit Court of Appeals for the Ninth Circuit. The action was brought in the Federal Court for Idaho to recover possession of certain cattle seized and held under process by an Idaho Sheriff. The plaintiff in the action (petitioner here) is a receiver appointed by an Oregon court in a proceeding to foreclose a mortgage on these cattle and on other property. On motion of the defendant Sheriff a non-suit was ordered by the trial court.

One of the grounds of the motion was lack of capacity in the foreign receiver to sue, it not being shown that he had reduced the property in dispute to his actual possession.

The point made by petitioner is that a receiver who has, in the jurisdiction of his appointment, taken actual possession of property, may sue without ancillary appointment in a federal court of another jurisdiction to regain possession of such property. The Circuit Court of Appeals is said to have held otherwise. There is language in the opinion that may be subject to this construction. Judge Sawtelle says:

> "Granting the soundness of the contention that the receiver was entitled to the undisturbed possession of the property and assuming that he actually had such possession, and granting or assuming that he had the power to sue locally in replevin for an unlawful interference with his right of possession, nevertheless such right of possession did not vest him with the title necessary to sue in the court below without an ancillary appointment therein;" (R. 93.)

The assumption of actual possession in the receiver appears to be a mere argumentative assumption, rather than a concession as to the state of the record. We do not believe the court intended or that it was necessary to declare the broad rule attributed to it by counsel. It is apparent from other portions of the opinion that the court has not departed from the principle laid down in the earlier opinion of Judge Gilbert in The Willamette,

66 Fed. 565, where the right of a foreign receiver to protect his actual possession is clearly stated.

But the case is properly to be disposed of on the basis of actualities rather than on assumptions. We think it unnecessary for us to take issue with counsel as to the state of the law, but only as to the state of the facts. We believe there is no sufficient evidence in the record to warrant its submission to the jury that the receiver reduced the cattle in dispute to his actual possession. On the contrary, the record discloses without substantial controversy that the cattle remained in the actual possession of the mortgagor and were seized on attachment in Idaho while still in his possession.

I.

The only evidence in the record on this subject is the testimony of the petitioner himself, plus some documentary evidence consisting of part of the files in the Oregon foreclosure suit. There was one other witness who testified, but his testimony is confined entirely to the subject of the value of the Skinner cattle, with which he had been generally familiar in prior years (R. 63-73). Since we take the view that a proper consideration of the facts should dispose of the case, we think it advisable to review the record in some detail, quoting from it where helpful.

On March 17, 1931, the Equitable Trust Company began foreclosure action in Malheur County, Oregon, against W. S. Skinner and wife. The receiver was appointed by ex parte order of the Oregon court on the

same day. The mortgage to be foreclosed covered certain cattle and horses, and also included a ranch situate some distance west of Jordan Valley in Malheur county. Aside from the mortgaged ranch, Skinner had two other ranches under lease from one Somerville, referred to in the record as the Reservoir Ranch and the Star Ranch (R. 42-44). The Reservoir Ranch is in Malheur County and the Star in Owyhee County, Idaho. It appears inferentially to have been on or in connection with these latter ranches that Skinner ran the mortgaged cattle. The lease-holds on the Reservoir and Star Ranches were not included in the mortgage to the Equitable Trust Company and the receiver had no jurisdiction over them (R. 43-44).

On March 28th following his appointment the receiver went to the Skinner Ranch west of Jordan Valley. This was the place under foreclosure. There were some cattle there at thetime. In the interest of clarity we will postpone discussion of the identity of these cattle to a later point in the brief, merely observing here that they were not shown to have been among the cattle later seized in Idaho. The mortgagor, Skinner, was not at the ranch but one Kirt Skinner was. The receiver presented to Kirt Skinner a copy of the order of his appointment but Skinner refused to recognize it or to deliver possession. We will quote the receiver's testimony (R. 34 and 45):

> "He further testified that, the day he came there, March 28th, Mr. Kirt Skinner was the only one there. He denied and disputed the right to have them taken over by the receiver at that time, at that particular time. He said there were part of the

cattle out on the range and part in the field, and that they would take care of them.

Q. Was there any further conversation had regarding the possession of the property with Skinner after you showed him the certified copy of the appointment?

A. He still objected.

Q. What did he say about taking care of the cattle?

A. He said he would take care of them. (R. 34.)

* * * * * * * *

Q. What conversation did you have with Kirt Skinner?

A. I handed him that paper and told him that the court had appointed me receiver and asked him to read it over.

Q. What did he say?

A. I do not remember that he said anything particularly right at that time, and then a little later he stated that for the present at least he would have to refuse to act under the order.

Q. That he would have to refuse to give you possession of the ranch?

A. Yes.

Q. What did you say?

A. I didn't answer.

Q. What did you do?

A. I went back to Jordan Valley and I believe I called Mr. Gallagher; I am not sure. (R. 45-46.)"

The receiver then went back to Ontario where he lived (R. 46), leaving a man on the Skinner ranch whose "duties were feeding what cattle and horses there were left there, doing general work and caring for the property." (R. 34.) This man "stayed until he took sick and

then was away for around two months and then came back." (R. 46.) The man is again referred to on Page 54 of the record where the receiver testified that he "had a man on the ranch, went there March 28th, stayed a month and a half, became ill, and left, went back with the Sheriff on August 22nd and remained there ever since." (R. 54.)

From March 28th until at least some time in July the receiver seems not to have functioned actively. Beyond making the trip to the Skinner ranch at the beginning of this period and leaving a man there, the record does not reveal his further movements until along in July. Meanwhile, about the last of June or the first of July the cattle in controversy were attached at the Star ranch in Idaho in an action brought in that state by Somerville against W. S. Skinner (R. 14). The cattle attached numbered 137 head, consisting of cows, steers, heifers and a number of calves (R. 41).

We now reach the crucial question whether up to that time the receiver had done anything to reduce these cattle to his actual possession.

We have observed that there were some cattle at the Skinner ranch when the receiver went there on March 28th. We wish now to look a little more closely into the identity of these cattle. If they were the same cattle afterwards attached in Idaho, then the receiver may be said to have taken a sort of scrambling possession of them; since, notwithstanding the refusal of Skinner to recognize his authority or to give up possession, still the received did leave a man on the place whose "duties

were feeding what cattle and horses there were left there."

We will point out in a moment that the Skinner cattle later attached in Idaho were not then at the Skinner ranch at all, but were at another place. For the present we want, so far as the record permits, to identify the cattle that were at the Skinner place at the time of the receiver's visit. The receiver did not count the number but "went around among them some." (R. 33.) On page 37 of the record he says he does not know what percentage of 100 head were there. When pressed by his counsel he says (R. 38) "That there were roughly about around 100 head." He does not describe them in any way as to age or kind.

What cattle were these? The receiver says (R. 33) "Part of them belonged to Mr. Skinner and some belonged to the Equitable Trust Company or the bondholders." On Page 46 he says that some of them also belonged to the Skinner boys. "The witness knew in addition to the W. S. Skinner stock the boys had certain stock not included in the property and over which he had no jurisdiction; that of the stock he saw on the 28th of March, some belonged to W. S. Skinner and some belonged to the boys." (R. 46.)

Thus, of the undetermined number and variety of cattle at the Skinner place when the receiver went there on March 28th, some belonged to the mortgagor, some belonged to the Equitable Trust Company or the bondholders, and some belonged to the Skinner boys. How many of them or of what variety belonged to the mortgagor, and therefore came under the receiver's jurisdic-

tion, no human intellect could determine from the record. The testimony affords hardly the basis for a guess. The receiver says (R. 37) that later "most of these cattle" then on the place were turned out of pasture and on the open range. When they were turned out, whether a month or three months later, whether before the attachment in Idaho or after, is not indicated; nor was the jury told whether the "most of them" turned out were mortgaged cattle or whether they were the ones belonging to the bondholders or to the Skinner boys.

At best, the record discloses a possibility that *some* cattle at the Skinner ranch at the time the receiver left a man there were later seized on attachment in Idaho, but it discloses no more than a possibility. Evidence as to approximate number or kind is wholly lacking. The subject was one capable of fairly definite proof and the receiver was suing to recover specific property. The burden of proof was on him. No case was made on this point which would warrant its submission to a jury, nor could the jury have reached any intelligent conclusion on the point had the case been submitted to it.

This court has said that

> "Before evidence may be left to the jury, 'there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.'"
>
> Pennsylvania Railroad Co. v. Chamberlain, ... 77 L. Ed. ..... Advance Sheet No. 9, 1932 Term Page 503 L. Ed.
>
> Pleasants v. Fant, 22 Wall. 116, 22 L. Ed. 780.

Turning again to the record, we find that it discloses quite clearly that the cattle seized by the defendant sheriff in Idaho were not at the Skinner ranch when the receiver went there on March 28th. It shows with equal clarity where they were at the time and that at no time did the receiver reduce them to his actual possession.

On cross examination of the receiver this colloquy occurred:

> "Q. I will ask you whether you saw these cattle supposed to be taken by the sheriff.
>
> A. I am not sure of it.
>
> Q. You do not know whether you ever saw them at all?
>
> A. No.
>
> Q. Then you do not know the quality of them from your own knowledge?
>
> A. These particular ones?
>
> Q. That the Sheriff seized, yes.
>
> A. I never saw them, no, sir." (R. 35-36.)

As to the whereabouts of the Skinner cattle, later taken into custody by the Idaho sheriff, the receiver testified as follows:

> "Q. On the 28th of March you went over to the Skinner ranch?
>
> A. Yes.
>
> Q. That is the place—that is not one of the places that Skinner had leased from Somerville?
>
> A. No, that is property that he owned over there.
>
> Q. That is the ranch that was included in the mortgage to the Equitable Trust Company?
>
> A. Yes.

* * * * * * *

Q. And who was there?

A. Kirt Skinner.

* * * * * * *

Q. What conversation did you have with Kirt Skinner?

A. I handed him that paper and told him that the court had appointed me receiver and asked him to read it over.

Q. What did he say?

A. I don't remember that he said anything particularly right at the time, and then a little later he stated that for the present at least he would have to refuse to act under the order.

Q. That he would have to refuse to give you possession of the ranch?

A. Yes.

Q. What did you say?

A. I didn't answer.

Q. What did you do?

A. I went back to Jordan Valley and I believe I called Mr. Gallagher; I am not sure.

* * * * * * *

Q. *Mr. Kirt Skinner told you where the cattle were that you had come to look at?*

A. *He did.*

Q. *Where did he say they were?*

A. *As I remember it, it was the Reservoir Ranch.*

Q. You had no jurisdiction over the Reservoir Ranch as you understood it.

A. No, sir.

Q. You were not entitled to possession of the Reservoir Ranch?

A. No, sir.

Q. *Did you understand from Skinner that these cattle the you were supposed to take charge of were in a field on the Reservoir Ranch.*

A. I don't think he said; I don't remember him saying that way, *he said they were at the Reservoir Ranch.*

Q. That was the 28th of March, wasn't it?

A. Yes.

* * * * * * * * * * *

Q. At any rate, you understood that the W. S. Skinner cattle were on the Reservoir Ranch; Kirt Skinner said they were in the field there?

A. There was nothing said whether they were in the field or outside.

Q. You assumed they were not in the field?

A. I don't remember forming any opinion either way.

Witness testified that he didn't go to Reservoir Ranch to look at any cattle; that he did not send anybody over there; that he didn't know how long the cattle remained at the Reservoir Ranch; that he didn't know which of the Skinner boys was at the Reservoir Ranch looking after the cattle; that he didn't know the circumstances under which the Skinner boys turned these cattle off the Reservoir Ranch; that he didn't know when they were turned on the range nor under what circumstances nor when nor by whom they were turned off the ranch.

Q. You don't know anything about it—do you know whether or not it was customary to summer these cattle in the neighborhood of the Star Ranch?

A. I do not know.

Q. That was their summer range?

A. I do not know.

Q. If turned on the range they would naturally go up around the Star ranch in Owyhee County?

A. I do not know.

Q. Where did you suppose they were going then?

A. I was not familiar, I couldn't say.

Q. You didn't go down to find out?
A. No, sir.
Q. Or send anybody to find out?
A. No sir.

Q. You have since learned because these cattle were seized by the Sheriff of Owyhee County that as a matter of fact they did go in the vicinity of the Star Ranch in Owyhee County?

A. That is where they were taken, yes." (R. 44-48.)

We have undertaken to analyze the relevant portions of the record with some care because of a tendency on the part of counsel for the petitioner to confuse the facts. This tendency is noticeable both in the direct examination of the receiver on the trial and in the statement of facts on appeal.

As an example see the following question and answer on pages 37 and 38 of the record:

"Q. I will ask you how many cattle, about how many cattle you took possession of, constructively or actually passing to you as receiver and as reported to the court under this trust."

This question is a fair example of the not very difficult art of obfuscation. The answer elicited is as follows:

"A. The list given me by the representative of the trustee that was in charge of the place at the time of the foreclosure.
Q. How many was that?
A. 141, I believe."

Upon this portion of the record counsel seem to base much of their contentions here. What information is conveyed by it we do not pretend to say.

In their statement of the facts in the petition counsel say:

> "The mortgagors breached the conditions of the deed of trust, and possession of the ranch and cattle was turned over to the trustee-mortgagee."

The record may be searched in vain for evidence that the possession of the mortgaged cattle was turned over to the trustee.

Again, counsel say on Page 13 of the petition:

> "The receiver * * on March 28, 1931, visited the ranch and presented his credentials**," and "thereupon arranged for the continued maintenance of the ranch, put a man in charge of the premises, arranged with the Skinners for the production of the hay, permitting them to remain on the ranch and pay as rental therefor a share of the hay grown."

The thought intended to be conveyed here is that on March 28th the receiver arranged with the mortgagor for the care and custody of the mortgaged property. This is a plain perversion of the record. The receiver testified (R. P. 49) that "The (Oregon) Sheriff made the sale in the foreclosure proceedings on the 22nd of August." This sale was of the real property only. (See order set out on Page 61 of the record.) On August 24th, following the sale, and on the application of the receiver, the Oregon court made an order to the effect that the receiver "be immediately put into possession

and that the Sheriff of this county is hereby ordered and directed to remove the defendants W. S. Skinner and Ella Skinner * * from said premises, and to place said Ivan E. Oakes in possession thereof."

The receiver testified that after the foreclosure sale, and evidently after the entry of the above order, he made arrangements with the Skinners for the harvesting of crops on the land. (R. Pp. 52-53.) Also that the order of August 24th putting him into possession was made after the Sheriff seized the cattle in Owyhee County. (R. Pp. 52-53.) As elsewhere stated the latter event took place in the latter part of June or the first of July.

It is apparent from this that any arrangements made with the Skinners for the custody and care of the mortgaged property were made at a date long subsequent to the seizure of the livestock by the Idaho officer.

Taking the record by its four corners, it is plain enough that the receiver at no time obtained actual possession of the livestock in dispute. His testimony reveals that the custody and control of them lay with the Skinners; and that the latter did not attorn to him or undertake to hold this property for him. Cattle on the range require a certain amount of attention. They require riding and salting, the branding of young calves in the springtime, attention to such details as the insuring of adequate feed and access to water. They are not left on their own like wild animals.

The receiver made not so much as a gesture in the direction of reducing these animals to his possession. He at no time exercised any dominion or control over them. That species of title which may be said to vest

in an actual possessor of tangible personality was not enjoyed by the petitioner here. So far as revealed by the record, the cattle were handled by the mortgagor as they had always been handled. They appear to have been ranged by him in two states, Oregon and Idaho. In the former state a receiver was appointed who confessedly had a right to reduce them to his possession, but who did not do so. In Idaho, rights of a resident creditor were asserted and the cattle seized in that state by an officer of its courts. It was a case for ancillary receivership in the latter state. In such proceedings the rights of resident creditors could be protected, or at least litigated in an orderly way and the property administered if necessary. Instead, the Oregon receiver, with no actual possession to vest him individually with a special title and with only the order of the Oregon court to clothe him with authority, brought replevin summarily to wrest possession from the Idaho Sheriff.

It was, as said by the Circuit Court of Appeals, a case governed by the rules laid down by this court in

Booth v. Clark, 17 How. 322, 15 L. Ed. 164;

Great Western Mining Co. v. Harris, 198 U. S. 561, 576;

Sterrett v. Second National Bank, 248 U. S. 73;

Lion Bonding Co. v. Karatz, 262 U. S. 77.

II.

While the Circuit Court of Appeals did not rest its decision upon the point, the case is governed by the long line of decisions of this court holding that an action

will not lie in a federal court to recover possession of property seized and held under process issued from a state court.

Taylor v. Carryl, 61 U. S. (20 How.) 583;
Freeman v. Howe, 65 U. S. 450, 16 L. Ed. 749;
Covell v. Heyman, 111 U. S. 176, 28 L. Ed. 390;
Gumbel v. Pitken, 124 U. S. 131, 31 L. Ed. 374;
Buck v. Colbath, 70 U. S. 347, 18 L. Ed. 257;
White v. Schloerb, 178 U. S. 542, 44 L. Ed. 1183;
Lammon v. Feusier, 111 U. S. 17, 28 L. Ed. 337;
Wabash Railroad Company v. Adelbert College, 209 U. S. 38, 52 L. Ed. 379;
Palmer v. Texas, 212 U. S. 118, 53 L. Ed. 435.

One of the grounds of the motion for non-suit granted by the trial court was that the action could not be maintained against an officer of the state court holding the property under process.

Petitioner relies on Bates v. Capital State Bank, 21 Ida. 141, 121 Pac. 561. It is stated in the syllabus of that case that under the requirements of the Idaho statute "if the plaintiff is successful in his action, judgment must be for the possession of the property or the value thereof in case a delivery cannot be had." This language is found also in the body of the opinion. A defendant, subject to such judgment as the court says must be entered, has no option whether he will deliver possession or pay the value of the property. He must give up possession if he has it.

We believe the decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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REPRINT

SUPREME COURT OF THE UNITED STATES.

No. 5.—OCTOBER TERM, 1933.

Ivan E. Oakes, Petitioner, *vs.* Ben Lake, as Sheriff of Owyhee County, Idaho.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[November 6, 1933.]

Mr. Justice SUTHERLAND delivered the opinion of the Court.

This is an action under the Idaho "claim and delivery" statute brought by petitioner in the federal district court for the district of Idaho. The complaint alleges that petitioner is a resident and inhabitant of the State of Oregon, and is the duly qualified receiver of the property which is the subject matter of the action, having been so appointed by an Oregon state circuit court; that following his appointment and qualification, and prior to March, 1931, as such receiver he took into his possession certain designated cattle, and has ever since been entitled to the immediate and exclusive possession thereof; that about the first day of July, 1931, the respondent took possession of the cattle in the State of Idaho by virtue of a writ of attachment; that respondent has refused to return said cattle to petitioner, although demand therefor was made prior to the commencement of the action. Judgment was prayed to the effect that petitioner is the owner and entitled to the immediate possession of the cattle, and in lieu thereof that he recover from respondent the sum of $5,000.

The answer, among other things, denies that petitioner took possession of the cattle as alleged, or any of them, and avers affirmatively that respondent in his official capacity seized the cattle upon a writ of execution duly issued by an Idaho state district court.

The case was tried before the federal district court and a jury. Petitioner offered evidence tending to show that he had taken actual possession of the cattle in the State of Oregon, and that the cattle thereafter were found in Idaho and there seized by respon-

dent. At the conclusion of petitioner's case respondent moved for non-suit and dismissal, upon the grounds, (1) that the proof shows that plaintiff had no capacity to sue in the courts of Idaho, since he had neither title to the property under the Oregon law or the order of the court appointing him, nor actual possession thereof, either in the State of Oregon or in the State of Idaho; (2) that an action of replevin will not lie in a United States court against a sheriff to take property from the possession of a state court. A third ground was urged, which we do not consider. It is without merit and is not pressed here. The court granted the motion, saying "that the proof is insufficient to initiate the liability on this hearing."

1. Upon appeal to the circuit court of appeals, that court, without considering other assignments of error, affirmed the judgment upon the ground that a receiver appointed in a state court is not entitled to sue in a foreign jurisdiction to repossess cattle, which, after being put in charge of his agent, cross over the boundary line into a foreign jurisdiction. Although respondent contends otherwise, the court below reached that conclusion in the face of an assumption that actual possession of the cattle had been taken by petitioner in Oregon. The language of the court follows:

"Granting the soundness of the contention that the receiver was entitled to the undisturbed possession of the property *and assuming that he actually had such possession* [italics supplied], and granting or assuming that he had the power to sue locally in replevin for an unlawful interference with his right of possession, nevertheless such right of possession did not vest him with the title necessary to sue in the court below without an ancillary appointment therein; and he was not entitled to bring the suit as a matter of comity." 62 F. (2d) 728, 730.

Upon the same assumption, namely, that the receiver had reduced the property to his actual possession in the State of Oregon, we reach a different conclusion.

The general rule undoubtedly is that an ordinary chancery receiver, having no other authority than that arising from his appointment as such, cannot as of right maintain an action in a state other than that in which he was appointed. The decision in *Booth* v. *Clark,* 17 How. 322, to that effect has been uniformly followed by this court. See, for example, *Great Western Mining Co.* v. *Harris,* 198 U. S. 561; *Sterrett* v. *Second National Bank,* 248 U. S.

73. The very terms in which the rule is expressed, however, clearly recognize that where the receiver has "other authority than that arising from his appointment as such," he may under some circumstances maintain an action outside the state of his appointment. And so it definitely has been held.

The foreign receiver may maintain such a suit, so far at least as the federal courts are concerned, where title to the property in question has been vested in him by conveyance or statute. In *Bernheimer* v. *Converse*, 206 U. S. 516, it was held that a receiver might sue in a foreign jurisdiction to collect upon the statutory liability of stockholders of a corporation, where the statute of the state conferred the right upon the receiver as *quasi*-assignee. Following that decision, this court, in *Converse* v. *Hamilton*, 224 U. S. 243, 256 *et seq.*, while reiterating the rule laid down in *Booth* v. *Clark, supra*, pointed out that the receiver suing in the *Hamilton* case was not merely an ordinary chancery receiver, but much more; that under the laws of the state of his appointment he became a *quasi*-assignee, vested with the rights of the creditors against the stockholders, and charged with the enforcement of those rights in the courts of the state and elsewhere; that his right to maintain an action in another state properly could not be denied as presenting a question only of comity unaffected by the full faith and credit clause of the federal Constitution. The case involved the right of a receiver of an insolvent Minnesota corporation to maintain a suit in Wisconsin against two stockholders to enforce an asserted double liability imposed by the Minnesota statute. The Wisconsin court refused to entertain the suit, holding it to be a matter of comity; but this court, denying that view, reversed on the ground that thereby the laws of Minnesota and the judicial proceedings of that state had not been accorded the faith and credit to which they were entitled under the federal Constitution.

In the case just dealt with, and in other cases where the receivership property has been assigned to the receiver by its owner, the suit is brought not strictly in his capacity as receiver, by virtue of his appointment in another state, but in his capacity as assignee. High, Receivers, 4th Ed., § 244. His designation as receiver, etc., in the title of the cause may be regarded as *descriptio pensonae* merely.

Coming immediately to the present case, the authorities, federal and state, are in practical accord to the effect that where the re-

ceiver appointed in one state has taken possession of property which thereafter is found and seized upon process in another state, the receiver may maintain an action in the latter state to recover possession or for other appropriate relief. *The Willamette Valley*, 66 Fed. 565, 567; *Hopkins* v. *Lancaster*, 254 Fed. 190, 191-192; *Wilkinson* v. *Culver*, 25 Fed. 639; *Jenkins* v. *Purcell*, 29 App. D. C. 209, 215; *Lyon* v. *Russell*, 41 App. D. C. 554, 559; *Pond* v. *Cooke*, 45 Conn. 126, 132; *Robertson* v. *Staed*, 135 Mo. 135, 137; *Woodhull* v. *Trust Co.*, 11 N. D. 157, 163-164; *Cagill* v. *Wooldridge*, 67 Tenn. (8 Baxt.) 580, 582-583. Other cases might be cited to the same effect. The only decision which we have found definitely to the contrary is *Humphreys* v. *Hopkins*, 81 Cal. 551, but in which there is a convincing dissenting opinion in harmony with the general current of authority.

In some of the cases cited the courts seem to have put their determination in favor of the receiver upon the ground of comity. With this view, however, we do not agree. It is a matter of right, as this court has said. *Converse* v. *Hamilton, supra.* The true rule is stated in *Robertson* v. *Staed, supra*, by the supreme court of Missouri, where it was held that where the receiver has taken possession of property in pursuance of his appointment, a special property is thereby vested in him which enables him to maintain a suit for the recovery of the property in a foreign jurisdiction; and that the principle upon which that may be done is "one of law and not of comity."

2. The other ground upon which respondent asked a dismissal of the action by the trial court is that an action of replevin "will not lie in a United States court against a sheriff to take property from the possession of a state court." Respondent, in support of that contention, relies on *Freeman* v. *Howe*, 24 How. 450, and later cases decided by this court following that decision. It was held in the *Freeman* case that replevin would not lie in a state court against a United States marshal who held property seized by him under process issued by a federal court,—this, for the reason, as stated in *Covell* v. *Heyman*, 111 U. S. 176, 179, that such property is in the custody of the law and within the exclusive jurisdiction of the court, from which the process has issued, for the purposes of the writ; that to disturb this possession by process from a state

court would be to invade the jurisdiction of the federal court by whose command it is held.

We do not stop to consider whether this rule is applicable to the present case, where the property is in the hands of a sheriff under process issued by a state court, and the action to recover possession, normally within the exclusive jurisdiction of the state courts, is brought in a federal court on the sole ground of diversity of citizenship.* We find it unnecessary to do so for the reasons now to be stated.

The effect of the Idaho so-called claim and delivery statute is to abolish the common law action of replevin and substitute therefor the statutory action. Under the statute the action will lie whether immediate possession be demanded or not. If immediate delivery be claimed, an affidavit must be filed setting forth certain facts, and a written undertaking in a prescribed form be given. Here petitioner filed no affidavit or undertaking, nor did he seek the immediate possession of the property. If, upon the trial, he proves his case, the form of judgment prescribed by the statute is for the possession of the property or the value thereof *in case a delivery cannot be had.* *Bates* v. *Capital State Bank*, 21 Ida. 141, 149.

Respondent's position is based upon the view that since a state court cannot interfere with property held by a United States marshal under process issued by a federal court, by parity of reasoning a federal court cannot interfere with property held by a sheriff under process issued by a state court. Petitioner—making no attempt to distinguish the one case from the other—in terms neither concedes nor denies this view. He replies simply that under the Idaho statute no conflict between the courts is involved, for, since the sheriff's possession has not been and need not be disturbed, there is no question of conflict of possession before the court. He rests his case, in this respect, upon the provision of the statute allowing judgment for the value of the property where delivery cannot be had. In this aspect, we put aside the question of intereference with the jurisdiction of the state court as not being really involved. If, upon a new trial, petitioner and re-

*Compare Wise *v.* Jefferis, 51 Fed. 641; Gilman *v.* Perkins, 7 Fed. 887; Wood *v.* Weimar, 104 U. S. 786.

spondent unite in the view that a delivery cannot be had, we perceive no reason why the trial court may not proceed with the case upon that theory and dispose of it as one to recover the value of the property and damages; and we hold accordingly. Should a different situation be presented, it can be appropriately dealt with when it arises. That under the Idaho statute the court may thus dispose of the case when for any reason a delivery cannot be had, is a proposition which finds abundant support in the decisions. *Boley* v. *Griswold,* 20 Wall. 486; *Erreca* v. *Meyer,* 142 Cal. 308, 310; *Claudius* v. *Aguirre,* 89 Cal. 501, 504 *et seq.*; *De Thomas* v. *Witherby,* 61 Cal. 92, 97; *Donovan* v. *Aetna Indemnity Co.,* 10 Cal. App. 723, 727-729.

In *Porter* v. *Davidson,* 62 Fed. 626, 629, a similar conclusion was reached under a North Carolina statute. That court, after stating the rule laid down in *Freeman* v. *Howe, supra, Covell* v. *Heyman, supra,* and other cases, held that these decisions went only to the possession of the *res,* and that the remedy might be pursued against the sheriff for damages in any court. "The proceedings of the plaintiff in this case by which he took from the possession of the sheriff the chattels levied on was ancillary, not in any way affecting the merits of the original case. That can go on without conflicting with any of the cases quoted above."

The court of appeals did not consider the question whether petitioner had made out a case of actual possession in Oregon. Nor can we say from the very general words of the judge in granting respondent's motion and in discharging the jury that this precise question of fact was passed upon by the trial court. We, therefore, do not consider it, but leave it to be disposed of in the further proceedings which must be had in the district court.

Judgments reversed and cause remanded to the district court for further proceedings in conformity with this opinion.

A true copy.

Test:

Clerk, Supreme Court, U. S.